giving warning of his approach he attempted to overtake the cyclist in front of him, allowing at the very most a few inches of clearness. In doing so he acted not merely rashly but with a very high degree of rashness, and, that being so, his conviction must stand.

As regards sentence, the appellant is a first offender, and I am told that if he is to go to prison it will materially affect his future chances of earning his livelihood as an insurance agent. There is no suggestion of alcohol in the case and although there was present a high degree of rashness, nevertheless that rashness was attended with a certain amount of misfortune. I am reluctant to interfere with the learned Magistrate's decision on the question of sentence, but it is possible that he has been influenced in this regard by his opinion, with which I do not agree, that the facts in this case were more serious than those in the case of *Kuan Choon Hin v. Public Prosecutor, supra.* In that case the accused person 'was driving at a grossly excessive speed, having regard to the fact that he was travelling along a road which, according to the police evidence, was usually crowded' whereas here the appellant was travelling along a road where he was unlikely to encounter and did not in fact encounter a great deal of traffic. In all the circumstances of the case I have come to the conclusion, although as I have said with some reluctance, that the sentence of imprisonment imposed by the Magistrate should be quashed and that there should be substituted for it a fine of $800 or four months' rigorous imprisonment in default of payment.

Before departing from the case, there is one observation I feel called upon to make. In the existing law relating to road traffic there is no provision enabling a Court to suspend the driving licence of a person who is convicted under section 304A of the Penal Code although there is such a power to suspend on conviction for the less serious offence of dangerous driving under section 4(3) of the Motor Vehicles (Driving Offences) Proclamation. This is a serious defect which so far as I am aware does not occur in the law of any other civilised country, and to my mind it calls for immediate remedy on the part of the Legislature.

Appeal against conviction dismissed—Sentence of fine substituted for imprisonment.

CHEDIN MOHAMED HASHIM
v.
TEOH ONG THOR AND CHEW CHAN SENG.

[Orig. Civ. Juris. (Jobling, J.) May 3, 1950]

[Penang—Civil Suit No. 180 of 1949]

Damages for conversion of two lighters—Wrongful sale of mortgaged property—Whether mortgagee has right to sue.

In this case the plaintiff claimed damages from the defendants for conversion of two lighters which were mortgaged to him.

The facts were that on the 4th day of July, 1949, the Bailiff of the Magistrates' Court, Penang, in execution of a judgment obtained by the first defendant against one Mastan Maricar, seized the two lighters which were mortgaged to the plaintiff, sold the same on the 11th day of July, 1949, at a public auction as the property of the said Mastan Maricar and delivered them to the second defendant, the highest bidder at the auction, as the purchaser. The Bailiff gave evidence that the first defendant personally pointed out the two lighters in question and informed him that they were the property of Mastan Maricar against whom he had obtained judgment. There were two points before the Court for consideration: firstly, whether the mortgagee has the right to sue and secondly, whether the second defendant acquired a good title by purchasing at the Sheriff's sale.

Held, (1) that the mortgagee was a person with the right to possession and as such is entitled to maintain this action; (2) that as in the present case the first defendant personally indicated the goods of the plaintiff to the Bailiff and as they were not those of the execution debtor the sale was wrong and passed no title.

Cases referred to:—

(1) *Farrant v. Thomson* 5 B. & Ald. 826.

(2) *Morris v. Salberg* 22 Q.B.D. 614.

ACTION for damages in tort.

Khoo Soon Chee for the plaintiff.

C. O. Lim for the second defendant.

Jobling, J.: —The plaintiff in this suit claims damages from the defendants for conversion of two lighters. No appearance was entered for the first defendant, but the claim has been resisted by the second defendant, on whose behalf Mr. C. O. Lim appeared.

The facts that appear from the pleadings and the evidence are as follows:—

The two lighters claimed Nos. P.C. 466 and P.C. 349 together with others were assigned by an Indenture of Mortgage to the plaintiff by way of security for the payment of the sum of $8,300/- together with interest, which sum was to be repaid by six monthly instalments on the dates set out in the Mortgage Deed. This Mortgage Deed was duly recorded at the Harbour Master's Office on the 26th day of January, 1949. The Mortgage Deed contained a proviso entitling the plaintiff in default of payment of any instalment to seize and take possession of the mortgaged property and sell the same. On the 25th June, 1949, payment of the instalments was in arrear and mortgagee issued

a summons to mortgagor in respect thereof. This summons was not served.

On the 4th day of July, 1949, the Bailiff of the Magistrates' Court, Penang, in execution of a judgment obtained by the first defendant against one Mastan Maricar seized the two lighters Nos. P.C. 466 and P.C. 349 and sold the same on the 11th day of July, 1949, at a public auction as the property of the said Mastan Maricar and delivered them to the second defendant, the highest bidder at the auction, as the purchaser. The Bailiff gave evidence that the first defendant personally pointed out the two lighters in question and informed him that they were the property of Mastan Maricar, against whom he had obtained judgment.

On these facts the plaintiff submits that as mortgagee he has the right to sue for the return of the property and that the registration of the Mortgage Deed at the Harbour Master's Office precludes the defendants saying that they have no notice of it.

Mr. C. O. Lim resists this claim on the ground that the mortgagee was not the owner and therefore not the proper person to sue in this matter, and further that the second defendant acquired a good title by the sale by the Sheriff. He has also in the pleadings alleged that there is no privity of contract between the second defendant and the plaintiff and therefore no cause of action arises.

As this is a claim in tort and not in contract the question of privity of contract between the parties does not arise. The two points to be considered in this matter therefore are first, whether the mortgagee has the right to sue and secondly, whether the second defendant acquired a good title by purchasing at the Sheriff's sale.

It is well settled law that a mortgagee has the right to maintain an action in relation to the mortgaged property provided he has the right to take possession. In this case the plaintiff's right to possession arose under the mortgage immediately payment of the instalments by the mortgagor was overdue.

Mr. Lim has submitted that the action of the mortgagee in issuing a summons to the mortgagor for payment of the instalments amounted to waiver of his right to take possession. It is clear, however, that the issue of the summons in no way affected the mortgagee's right to possession; he could still have exercised it notwithstanding the summons. I find therefore that the mortgagee was a person with the right to possession and as such is entitled to maintain this action.

The law on the second point seems equally clear. In *Farrant v. Thompson*[1] it was held that where the goods sold by the Sheriff were those of a stranger and not of the party against whom the execution issued the owner could recover even against a *bona fide* purchaser for value. Mr. Lim objected that this authority only applied to an owner and not to a mortgagee. There is no substance in this contention. Legal title to the goods was conveyed to the mortgagee by the mortgage and although the right to redeem which resides in the mortgagor would also entitle him to maintain an action in relation to the property the mortgagee is nevertheless the legal owner and an owner within the meaning of the term in this authority.

A purchaser acquires no better title than the seller had and in *Morris v. Salberg*[2] sale by the Sheriff of the goods of a stranger where the endorsement on the writ of execution directed him to levy on those goods was held to be wrongful and to convey no title to them. In the present case the first defendant personally indicated the goods of plaintiff to the Sheriff and as they were not those of the execution debtor the sale was wrongful and passed no title.

I find therefore that the sale of these tongkangs was wrongful and the plaintiff is entitled to damages against the defendants for their conversion.

The tongkangs were sold by public auction and the amount realised must be regarded as their value at the time of the conversion. Tongkang P.C. 349 realised $305/-. But tongkang P.C. 466 was sold together with another for the sum of $375/-. I have no evidence that any difference existed between the two tongkangs, which were sold together and I must assume that they were of equal value, and the value of P.C. 466 is therefore $187.50.

Judgment for the plaintiff for $492.50 and costs.

Judgment for the plaintiff.

BEH CHANG HIN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Callow, J.) February 11, 1950]

[Alor Star — Criminal Appeal No. 49 of 1949]

Prohibition of Imports Order, 1946 — Submission of no case to meet — Evidence of accused person given after submission is overruled — Forfeiture of goods — Request of owner of seized goods to be heard before forfeiture is ordered.

In this case the appellant appealed against the convictions, fines and forfeitures imposed upon him for contravention of section 2 of the Prohibition of Imports Order, 1946. On appeal it was argued inter alia (a) that